MOHAMAD ALHAMDU ZAINUDDIN v. ACP KHAW KOK CHIN PENGERUSI, LEMBAGA TATATERTIB BRIGED UTARA PASUKAN GERAKAN AM, PDRM, ULU KINTA, PERAK & ORS

HIGH COURT MALAYA, IPOH
HAYATUL AKMAL ABDUL AZIZ JC
[JUDICIAL REVIEW NO: 25-18-07-2015]
19 JANUARY 2017

CIVIL PROCEDURE: *Discovery – Inspection of documents – Application for – Whether documents formed basis of charges against applicant – Whether applicant entitled to documents to assist in fair adjudication and disposal of case – Relevancy and importance of documents – Whether documents classified under Official Secrets Act 1972 – Whether ingredients for application for discovery proved – Rules of Court 2012, O. 24 & O. 53 r. 6*

ADMINISTRATIVE LAW: *Judicial review – Discovery – Inspection of documents – Application for – Whether documents formed basis of charges against applicant – Whether applicant entitled to documents to assist in fair adjudication and disposal of case – Relevancy and importance of documents – Whether documents classified under Official Secrets Act 1972 – Whether ingredients for application for discovery proved – Rules of Court 2012, O. 24 & O. 53 r. 6*

This was an application for judicial review seeking for an order of *certiorari* to quash the decision of the Disciplinary Board ('second respondent') of the Royal Malaysian Police Force ('PDRM') in dismissing the applicant. A disciplinary action against the applicant was taken pursuant to reg. 4(2)(i) of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 and two charges preferred against the applicant as stated in the show cause letter. The applicant applied under O. 53 r. 6 of the Rules of Court 2012 ('ROC 2012') for discovery and inspection of documents in relation to the said judicial review application. The applicant submitted that all the documents listed at para a (i – xxix) were to be given to him for inspection so as to enable him to file an affidavit in reply to the affidavits of the first, third and fourth respondents. The documents at para a (i-xxvi) were the minutes of proceedings of the disciplinary board from the start until the end of the proceedings to enable the court to peruse the decision-making process. The applicant submitted that since the documents requested formed the basis of the charges proffered against the applicant, therefore the applicant was entitled to those documents to assist in the fair adjudication and disposal of this case. It was the contention of the Senior Federal Counsel for the respondents ('SFC') that this application for discovery by the applicant was nothing more than a fishing expedition in an effort to secure evidence of procedural impropriety where none existed. The SFC further argued that the

documents in the disciplinary proceeding file was categorised as official secret documents classified under the Official Secrets Act 1972 ('OSA') and any documents classified under the OSA could not be communicated to any other party. The SFC also admitted that the discovery of documents was not as of right but it was the discretion of the court depending on the merits of the case.

Held (allowing application):

(1) Discovery may be ordered if it is required that justice of the case be advanced and where it is necessary to dispose of the matter fairly within the meaning of O. 24 r. 8 ROC 2012. Discovery may not be ordered where there is no evidence to show that the reasoning of the decision-making process is defective or unreasonable and the purpose of the discovery application is to find out such defect or unreasonableness from the respondent's documents. An order for discovery may be made at any stage of the proceedings in any cause or matter in respect of documents that adversely affect a party's case or support a party's case (O. 24 r. 12 ROC 2012). (para 11)

(2) The first and second respondents relied on documents based on investigation and the evidence of witnesses when the decision was made against the applicant. The supporting documents used by the first and second respondents in arriving at its finding was crucial for the applicant for his defence and it was necessary for him to have sight of these documents in order to advance his case in this proceeding. The documents which were used as the foundation of the allegation which formed the subject matter of the charge were central to his defence. The documents sought were not only merely connected to the merits of the second respondent's decision but as rightly contended by the applicant, a scrutiny of the documents would be invaluable in deciding whether the second respondent had taken the right approach in its decision-making process to arrive at a fair and just decision on the facts. Hence, the applicant had the right to discovery as the documents were indeed relevant for the purpose of an order for discovery. (paras 24 & 28)

(3) The respondents have not denied that they had the document for discovery at para a (i-xxix) but had instead elected to submit on the relevancy of those documents. The issue of relevancy of documents, however, was not for the respondents to decide; it was for the court to determine. The respondent did not file any affidavit to show they did not have the said documents in their custody. The fact that the applicant had pleaded guilty to the two charges against him (in which the appellant had denied) was not a criteria or ingredient in the application for discovery of documents. (paras 26, 27 & 32)

(4) As long as the applicant had tangible interest in those documents which the applicant proposed to use to support his application for judicial review, then an order for discovery ought to be granted. The applicant had succeeded in showing the relevancy and importance of documents to assist in the just disposal of this case. It was of paramount importance for it to be presented to the court in order for this matter to be justly adjudicated. (paras 26 & 27)

(5) Section 2 of the Official Secrets Act 1972 defines that official secret means any document specified in the Schedule and any information and material relating thereto and includes of any other official document, information and material as may be classified as "Top Secret" or "Confidential." The mere assertion of confidentiality without evidence in support could not shut out relevant evidence. There are a plethora of cases where the minutes of proceedings in disciplinary proceedings were produced and served to the other applicants. (para 34)

(6) The applicant was dissatisfied with the findings of the Disciplinary Board and wanted to vindicate himself by instituting legal proceedings in the courts. In order to do so effectively, the notes of evidence of the disciplinary proceedings would be a pre-requisite for the proper conduct of his case. To avoid the court proceeding as mere empty formalities, hence it was apparent that a record of the evidence would be necessary as a reasoned order. Hence, the applicant had proven all the ingredients for an application for discovery. (para 35)

Obiter:

(1) There is in our administrative and judicial system a legitimate expectation that procedural fairness would be maintained throughout an administrative process. Procedural fairness in administrative proceedings is an essential element in administrative functioning. (para 35)

Case(s) referred to:

ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 7 CLJ 357 HC ***(refd)***

Associated Provincial Picture House Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

BA Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***

Dato Hamzah Abdul Majid & Anor v. Wembley Industries Holding Bhd & Anor [2002] MLJU 754 ***(refd)***

Ganesan Singaram v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1997] 1 LNS 227 HC ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA ***(refd)***

Padfield & Ors v. Minister of Agriculture, Fisheries and Food & Ors [1968] 1 All ER 694 ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Pheh Boon Kheang v. Peh Boon Wang [2007] 7 CLJ 616 HC ***(refd)***

Rafidain Bank v. Agom Universal Sugar Trading Co Ltd & Anor [1987] 1 WLR 1606 ***(refd)***

Rekapacific Bhd v. Securities Commission & Anor & Other Appeals [2005] 2 CLJ 108 CA ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Official Secrets Act 1972, s. 2B

Rules of Court 2012, O. 24 rr. 3, 7, 8, 8A, 10, 11, 12, 13, 16, O. 53 rr. 3(2), 6

Rules of the High Court 1980, O. 24 r. 10

For the applicant - Ebrina Zubir; M/s Maniam Nair & Co

For the respondents - Fatin Hanum Abdul Hadi, SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Hayatul Akmal Abdul Aziz JC:

Introduction

[1] This is an application made under O. 53 r. 6 of the Rules of Court 2012 ("ROC 2012") to be read together with O. 24 rr. 3, 7, 8, 8A, 10, 11, 12 and 16 of the ROC 2012, for the discovery and inspection of documents in relation to an application for judicial review. The application was for an order that the respondents be compelled to produce or cause discovery to be made of the documents listed at para a (i-xxix) of the application within seven days from the order of court and for cost to be in the cause.

[2] The cause papers for the purpose of this application are as follows:

(a) Enclosure (1): Application for judicial review dated 13 July 2015;

(b) Enclosure (2): Applicant's affidavit in support affirmed by Mohamad Alhamdu dated 10 July 2015;

(c) Enclosure (3): Statement pursuant to O. 53 r. 3(2) of the ROC 2012 dated 9 July 2015;

(d) Enclosure (11): First respondent's affidavit in reply affirmed by ACP Khaw Kok Chin dated 18 April 2016;

(e) Enclosure (12): Third respondent's affidavit in reply affirmed by Sub-Insp Mohamat Shukri Hadafie bin Daud (RF 76030) dated 18 April 2016;

(f) Enclosure (13): Fourth respondent's affidavit in reply affirmed by Kop Sogi a/l Mail (RF 148723) dated 18 April 2016;

(g) Enclosure (15): Notice of application for discovery and inspection of documents dated 24 May 2016;

(h) Enclosure (16): Applicant's affidavit in support affirmed by Mohamad Alhamdu dated 24 May 2016;

(i) Enclosure (17): Respondents affidavit in reply affirmed by ACP Khaw Kok Chin dated 21 July 2016;

(j) Enclosure (18): Applicant's further affidavit in reply affirmed by Mohamad Alhamdu dated 25 August 2016.

Submission by the applicant (encl. 19), submission by the respondents (encl. 21) and further oral submissions by both parties heard by this court on 5 October 2016.

[3] On 27 October 2016, after perusing the cause papers and hearing the submissions of counsel, this court allowed the applicant's application (encl. 15) with an order that the documents to be furnished to the applicant within 45 days (instead of seven days as prayed for) from the date of this order and no order as to cost. The respondents are now appealing against that decision.

Brief Facts

The facts of this case can be summarised as follows:

[4] The is an application for judicial review seeking for an order of *certiorari* to quash the decision of the second respondent, the disciplinary board Briged Utara Pasukan Gerakan Am (PGA), PDRM, Ulu Kinta, Perak ("the disciplinary board"). The first respondent is the chairman of the disciplinary board, the second respondent is the disciplinary board while the third respondent is the person who served the applicant with the show cause letter and the fourth respondent who drafted and prepared the applicant's representation dated 31 January 2015. The fifth respondent is the Inspector General of Police, while the sixth respondent is the Government of Malaysia. The second respondent found the applicant guilty of both charges preferred against him and ordered his dismissal from the Royal Malaysian Police Force ("PDRM") effective from 10 April 2015.

[5] The applicant was a Constable (percubaan) with PDRM starting from 25 February 2013. On 21 January 2015 he received a show cause letter (Surat Tindakan Tatatertib Di Bawah Peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 Dengan Tujuan Buang Kerja Atau Turun Pangkat di bawah Peraturan 38, Peraturan Yang Sama) dated

14 January 2015 ("the said letter"), with instruction for the applicant to submit his representation within twenty-one (21) days from receipt of the said letter (encl. 2 – (exh. MAZ1)). The disciplinary action against the applicant was taken pursuant to reg. 4(2)(i) of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 and the two (2) charges preferred against the applicant as stated in the show cause letter. The said letter was served on the applicant by S/Insp Mohamat Shukri (third respondent).

[6] The applicant prepared his representation dated 26 January 2015 ("the first representation") and served it on the third respondent. The applicant claimed that third respondent told him "… kamu tidak boleh tulis macam ini sebab kamu salahkan "in charge …" and the third respondent proceeded to cancel and amend (hand written) the said first representation (encl. 2 – (exh. MAZ2)) and instructed the applicant to re-submit the representation.

[7] After facing some difficulty in drafting the second representation, the applicant sought the advice of the third respondent and was instructed by the third respondent to see Koperal Sogi a/l Mail (fourth respondent). The applicant alleged that the third respondent had instructed the fourth respondent to prepare a new representation for the applicant ("the second representation"). The fourth respondent proceeded to prepare the second representation dated 31 January 2015 and the applicant claimed that he didn't have the chance to read the second representation but signed it regardless, and alleged he was not given a copy of the said second representation (encl. 2 – (exh. MAZ3)). He was only given a copy of the said second representation by end of June 2015 when he requested for it for the purpose of filing in court (for judicial review to quash the aforesaid administrative decision).

[8] On 16 April 2015 the applicant received a letter dated 15 April 2015 (encl. 2 – (exh. MAZ4)) informing him of the decision of the disciplinary board as follows:

(a) For the first charge – the applicant is dismissed effective from 10 April 2015 (hukuman buang kerja)

(b) For the second charge – the applicant is given a warning (amaran)

The Law

[9] Order 53 r. 6 of the ROC 2012 provides, after leave has been granted, any party to an application for judicial review may apply to the judge for discovery and inspection of documents pursuant to O. 24, to administer interrogatories pursuant to O. 26, or to cross-examine the deponent of any affidavit filed in support of or in opposition to the application pursuant to O. 38. The court in considering this interlocutory application whether or not

to grant applications for discovery, interrogatories or cross-examination must exercise its discretion with a clear appreciation that judicial review proceedings are different from proceedings begun by writ, they are more limited in the context of judicial review (*Rekapacific Bhd v. Securities Commission & Anor & Other Appeals* [2005] 2 CLJ 108; [2003] 3 AMR 35). The paramount consideration is whether the information sought to be obtained by the applicant is relevant to any of the issues set out in the statutory statement and necessary for the just disposal of the case *(Rekapacific Bhd v. Securities Commission & Anor (supra))*. Unlike the previous r. 6, there is no requirement for an application for discovery etc to be made within 14 days upon the granting of leave. Such an application could now be made at any time upon the granting of leave (in this case, leave was granted on 30 September 2015).

[10] The order for discovery which are directly relevant to the present application, state as follows:

Order for discovery (O. 24, r. 3)

3(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a) The documents on which the party relies or will rely; and

(b) The documents which could:

(i) Adversely affect his own case;

(ii) Adversely affect another party's case; or

(iii) Support another party's case.

Order for discovery of particular documents (O. 24, r. 7)

7(1) Subject to rule 8, the court may at any time, on the application of any party to a cause matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 3.

(3) An application for an order under this rule shall be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application, and that it falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could -

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) a document which may lead the party seeking discovery of it to a series of inquiry resulting in his obtaining information which may:

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

(4) An order under this rule shall not be made in any cause or matter in respect of any party before an order under rule 3 has first been obtained in respect of that party, unless, in the opinion of the court, the order is necessary or desirable.

Historically in our judicial development, the obtaining of discovery of documents always was a right as between subject and subject. The foundation of the law of discovery as it existed prior to the introduction of rules to govern such procedures, was that the court could order a party to disclose documents relating to any matter in question which were in the party's possession, custody or power. In the absence of a proper basis for an order for discovery, disclosure should not be allowed. Thus, the defendant must establish its entitlement to an order for discovery and inspection as the order could not be made in the absence of any particulars of justification (see *ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd* [2003] 7 CLJ 357). The primary consideration of this order is with the physical possession or custody of documents, or the power to obtain such documents.

[11] Discovery may be ordered if it is required that justice of the case be advanced and where it is necessary to dispose of the matter fairly within the meaning of O. 24 r. 8 of the ROC 2012. Discovery may not be ordered where there is no evidence to show that the reasoning of the decision-making process is defective or unreasonable and the purpose of the discovery application is to find out such defect or unreasonableness from the respondent's documents. An order for discovery may be made at any stage of the proceedings in any cause or matter in respect of documents that

A adversely affect a party's case or support a party's case (O. 24 r. 12 ROC 2012). Production is to be ordered only if it is necessary for the just disposal of a case (O. 24 r. 13, ROC 2012).

[12] I am guided by the guidelines as stated in the case of *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581; [1993] MLJU 96 B where Edgar Joseph Jr SCJ held that:

> … The essential elements for an order for discovery are threefold; namely, first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for C discovery is sought.
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> It is indisputable, that the items of which discovery is sought are documents and that they are in the possession, custody or power of the Defendant and nothing more need be said about this.
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> As to "relevance", our Rules of the High Court limit discovery to D documents which are "relevant to" or "relate" to the factual issues in dispute.
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> More particularly, the discovery obligation applies to documents "relating to matters in question in the action" [Rules of High Court, Order 24, r. 1(1)] or "relating to any matter in question in the cause or matter" E [Order 24, r. 3(1)]. In practice, relevance is primarily determined by reference to the pleadings but there need not be pleading for a matter to be said to be in issue. (See *Phillips v. Phillips*[1]).
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> In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact F in issue. (See *George Ballantine & Sons Ltd v. Dixon & Son Ltd*[2]). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices."

[13] In *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42; [2008] 3 MLJ 625, the Court of Appeal affirmed the G principles enunciated in *Yekambaram Marimuthu (supra)* and decided that under O. 24 r. 10 of the RHC, the court has the jurisdiction to order discovery of a document referred to in an affidavit, whether or not the document is in the possession, custody or power of the party in whose affidavit the reference to that document is made (*Rafidain Bank v. Agom Universal Sugar Trading Co Ltd & Anor* [1987] 1 WLR 1606; [1987] 3 All ER H 859 (CA)). The discretion is vested in the court whether or not to make an order for discovery. An order will not be made if good cause to the contrary is shown. The absence of possession custody or power may amount to a good cause, but it is not always so. At the end of the day, the decision to order discovery is dependent on the facts of each particular case.

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[14] Guided by the principles established in the aforesaid authorities therefore to succeed in his application for discovery, the applicant has to fulfil the three requirements as follows:

(a) the documents sought must be relevant;

(b) there must be a document that is being discovered; and

(c) the document sought is in the possession, custody of that party against whom the order for discovery is sought.

Ultimately, whether an order for discovery should be made or otherwise depends on the facts relating to each particular case.

[15] The applicant applied for a list of documents for discovery and claimed these documents to be in possession of the respondents. For ease of reference I will reproduce the list of documents at para a (i-xxix), as follows:

i. Salinan Pengaduan (Kdg-D1);

ii. Gambar-gambar Tempat/Kawasan Kejadian sekitar Pos Sementara PB4 (Kdg-D7);

iii. Salinan Arahan Penugasan Briged Utara Bulan Mac 2014 (Kdg-D9);

iv. Salinan Arahan Penugasan PP Bn 3 PGA bagi Bulan Mac 2014 (Kdg-D10);

v. Salinan Perintah Gerakan Op Wawasan Kedah/Perlis Bil: 07/2014 (Kdg-D11);

vi. Salinan Arahan Penugasan Briged Utara Bulan April 2014 (Kdg-D12);

vii. Salinan senarai nama pegawai/anggota yang bertugas di Pos BKC 7 bagi bulan Mac 2014 (Kdg-D13);

viii. Salinan Borang Utusan Polis (Kdg-D14/D15);

ix. Laporan Prestasi Tugas Subjek (B-1), (B-2), (B-3) dan (B-4) (Kdg-D16);

x. Gambar-gambar Kegiatan Penyeludupan (Kdg-D17);

xi. Cakera Padat (CD) rakaman CCTV Kegiatan Penyeludupan (Kdg-D18);

xii. Salinan Borang Utusan Polis (Kdg-D21);

xiii. Salinan Buku Saku (Pol 5) Subjek (B-1), (B-2), (B-3) dan (B-4) (Kdg-D22);

xiv. Keterangan subjek (B-1/Pemohon) (Kdg B-1);

xv. Keterangan subjek (B-2) (Kdg B-2);

xvi. Keterangan subjek (B-3) (Kdg B-3);

xvii. Keterangan subjek (B-4) (Kdg B-4);

A xviii. Keterangan Pengadu lnsp G/18053 Rizuan bin Rosian (A-1) (Kdg A-1);

xix. Keterangan Saksi lnsp G/16049 Arif bin Ismail (A-2) (Kdg A-2);

xx. Keterangan Saksi ASP G/14755 Rosdi bin Ghani (A-3) (Kdg A-3);

B xxi. Keterangan Saksi ASP G/12422 Hasri bin Alias (A-4) (Kdg A-4);

xxii. Keterangan Saksl UKpl RF/148665 Suhaimi a/l Penjajah (A-5) (Kdg A-5);

xxiii. Keterangan Saksi Kpl RF/109787 Bah Atai a/l Ahpik (A-6) (Kdg A-6);

C xxiv. Keterangan Saksi Kpl RF/112648 Zainal a/l Bah Husain (A-7) (Kdg A-7);

xxv. Keterangan Saksi Koperal 68997 ltam a/l Hamid (A-8) (Kdg A-8);

xxvi. Keterangan Saksi Konstabel Percubaan RF/186819 Mohd Azawari bin Ghazali Buyong (A-9) (Kdg A-9);

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xxvii. Laporan pelanggaran tatatertib terhadap subjek Konst/Per 186809 Mohamad Alhamdu bin Zainuddin dan 3 yang lain bil (PR) (KST/BU/33/2014) bertarikh 8/12/2014 (Kdg L 1);

xxviii. Lapuran untuk pertimbangan kes *prima facie* di bawah Peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993;

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xxix. Nota prosiding perjalanan prosiding tatatertib dari mula hingga akhir terhadap Pemohon dan/atau biasanya dipanggil sebagai Minit Mesyuarat catitan prosiding tatatertib dan Alasan Keputusan dari mula hingga akhir.

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Submission By The Applicant

[16] Briefly, learned counsel for the applicant submitted that all the said documents at para a (i-xxix) are to be given to him for inspection so as to enable him to file an affidavit in reply to the affidavits of the first, third and fourth respondents. The documents at para a (i-xxvi) were referred to by the disciplinary board as stated in the affidavit of the first respondent (encl. 11 – (exh. KKC1)). The most important document would be the static photographs that show the said contraband activities. And also the CD of the CCTV recording of the said contraband activities which the applicant claimed to be a clear and conclusive evidence which are damaging and prejudicial documents which were considered without a notice given to him and alleged that it goes against the rule of natural justice.

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[17] The document at para a (xxvii) that is the laporan perlanggaran tatatertib terhadap subjek, was referred to by the disciplinary board as stated in the affidavit of the first respondent (encl. 11 – (exh. KKC1)). And further, the document as stated in para. a (xxviii) that is the laporan untuk

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pertimbangan kes *prima facie* di bawah peraturan 37, because it was relied upon in drafting the charges against the applicant. The document as stated in para. a (xxix) are the minutes of proceedings of the disciplinary board from the start until the end of the proceedings to enable this court to peruse the decision making process.

[18] By referring to the case of *Dato Hamzah bin Abdul Majid & Anor v. Wembley Industries Holding Bhd & Anor* [2002] MLJU 754, learned counsel submitted that since the documents requested form the basis of the charges proffered against the applicant, therefore, the applicant is entitle to those documents to assist in the fair adjudication and disposal of this case. She further submitted that the applicant has a tangible interest and the documents concerned the applicant himself are of direct relevance to his grievances and the documents are necessary for the due protection of his own interest. She further submitted that the applicant has complied with the elements for discovery as was decided in *Yekambaram Marimuthu (supra).*

Submission By The Respondents

[19] The Senior Federal Counsel ("SFC") submitted that there are two (2) charges faced by the applicant as stated in the show cause letter. The applicant submitted the representation dated 31 January 2015 which he admitted to both charges and seek apologies for the acts done and to be given a second chance and promised not to repeat the same act again. Nevertheless now the applicant denied the said representation and claimed that it was amended by third respondent and fourth respondent, respectively. By letter dated 15 April 2015, the disciplinary board had dismissed the applicant's service with effect from 10 April 2015 under reg. 38(g) of Regulations 1993 (first charge) and imposed a warning under reg. 38(a) (second charge).

[20] By referring to the case of *Pheh Boon Kheang v. Peh Boon Wang* [2007] 7 CLJ 616, the SFC submitted that the applicant had failed to state the reason for requiring the documents for the purpose of examination. It is contended by the SFC that the reason forwarded by the applicant at para. 6.6.1 of his affidavit (encl. 16) clearly shows that the applicant is on a fishing expedition to secure merits from the further evidence sought. It shows that the applicant is unsure whether there exist any procedural impropriety in the disciplinary action taken against the applicant.

[21] It is the contention of the SFC that this application for discovery by the applicant is nothing more than a fishing expedition in an effort to secure evidence of procedural impropriety where none existed. The SFC further submitted that the documents in the disciplinary proceeding file was categorised as official secret documents classified under the Official Secrets Act 1972 (Act 88) ("OSA") and any documents classified under the OSA

A cannot be communicated to any other party. The SFC admitted that the discovery of documents is not as of right but it is the discretion of the court depending on the merits of the case.

Findings Of This Court

B **[22]** At the outset, as rightly submitted by the SFC that the discovery of document is not as of right but it is the discretion of the court and it depends so much on the merit of each particular case (*Ong Boon Hua & Anor (supra)*).

[23] In the present case the evidence relied upon by the first and second respondents in finding the applicant guilty of the charges are set out clearly C in the first respondent's affidavit in reply as follows:

> 4.4. Selanjutnya, setelah menimbangkan segala maklumat yang ada saya mendapati wujudnya satu kes *prima facie* terhadap pemohon yang mewajarkan pemohon dikenakan tindakan tatatertib dengan tujuan buang kerja atau turun pangkat di bawah Peraturan 37 PPPA 1993 di atas dua (2) pertuduhan sepertimana terkandung dalam surat D Tunjuk Sebab bertarikh 14.01.2015. Pemohon juga dikehendaki membuat representasi bertulis yang mengandungi alasan-alasan untuk membebaskan dirinya dari semua pertuduhan yang dikemukakan dalam tempoh 21 hari;
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> 4.5. Lanjutan daripada itu, Pemohon telah melalui surat bertarikh E 31.01.2015 mengemukakan representasi beliau. Di dalam surat representasinya, Pemohon telah mengaku kesalahan bersabit dengan Pertuduhan Pertama dan Kedua serta memohon kemaafan supaya diberi peluang kali kedua dan berjanji tidak mengulangi lagi kesalahan tersebut.
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> F 21. … saya sesungguhnya menyatakan bahawa keputusan Responden kedua menjatuhkan hukuman buang kerja adalah berdasarkan hasil siasatan dan keterangan-keterangan saksi-saksi serta keseriusan kesalahan yang dilakukan tidak mewajarkan Pemohon dikenakan hukuman-hukuman lain yang lebih ringan.

G **[24]** I am of the considered view that clearly the first and the second respondent relied on documents based on investigation and the evidence of witnesses when the decision was made against the applicant. The supporting documents used by the first and second respondent in arriving at its finding were crucial for the applicant for his defence and it is necessary for him to H have sight of these documents in order to advance his case in this proceeding. In fact the documents which were used as the foundation of the allegation which form the subject matter of the charge were central to his defence. In my view, the documents sought were not only merely connected to the merits of the second respondent's decision but as rightly contended by the applicant, a scrutiny of the documents would be invaluable in deciding I

whether the second respondent has taken the right approach in its decision-making process to arrive at a fair and just decision on the facts. I am guided by the Supreme Court decision in *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9, that subscribed to the speech of Lord Greene MR in the celebrated case of *Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] 1 KB 223 that had propounded the doctrine of "*Wednesbury* Unreasonableness". The High Court can only interfere with an act of an executive authority if it could be shown that the decision maker had:

(a) misdirected himself in point of law;

(b) taken into account some wholly irrelevant or extraneous consideration;

(c) wholly omitted to take into account a relevant consideration; or

(d) contravened the object of the enabling statute by his decision.

[25] It should be emphasised that the action of the executive authority is unlawful not merely because it misdirects itself in respect of some points of law but also because it acted in any other way aforementioned. Lord Reid's observation in *Padfield & Ors v. Minister of Agriculture, Fisheries and Food & Ors* [1968] 1 All ER 694 provides the rationale, the last among the *Wednesbury* principles:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and object of the Act ... If he uses his discretion as to thwart or run counter to the policy and the objects of the Act, it should be amenable to correction by Superior Courts.

Anchored on these fundamental judicial pronouncements, it has to be said in no uncertain terms that, all that is required to be done and presented to this court must be done to ensure a fair and just adjudication of the matter before it to be achieved.

[26] I agree with the submission by counsel that the respondent have never denied that they have the documents for discovery at para a (i-xxix) but had instead elected to submit on the relevancy of those documents. I am of the considered view that the issue of relevancy of documents is not for the respondents to decide but it is for the court to determine.

[27] In the present case, I find that the respondent didn't file any affidavit to show that they do not have the said documents in their custody. I agree with the submission by counsel that as long as they can show that the applicant has tangible interest in those documents which the applicant propose to use to support his application for judicial review than an order for discovery ought to be granted. In this case, I find the applicant has succeeded in showing the relevancy and importance of documents to assist

A in the just disposal of this case. I hold as such by examining the affidavit of first respondent (encl. 11) in particular to exh. KKC1 which enclosed a report titled (lampiran L-1- "Laporan Siasatan Tatatertib Terhadap Konstabel Percubaan RF/186809 Mohamad Alhamdu bin Zainudin, Koperal RF/1468603 Fauzi a/l Uda, Koperal RF/148724 Yusop bin Enjok
B Dan Konstabel Percubaan RF/186821 Rasali a/l Omar, Batalion 18, Pasukan Gerakan Am, Pengkalan Hulu, Perak") signed by Insp Muhamad Nazre bin Hamzah, Pegawai Integriti, Pegawai Kes, Briged Utara, PGA, Ulu Kinta, Perak ("the said report"), it is of paramount importance for it to be presented to the court in order for this matter to be justly adjudicated.

C **[28]** I refer to the said report at para. 3.25 (p. 14 of the said report) and I cross refer to the applicant's application (encl. 15) at para a (i-xiii). All these documents inclusive of the CCTV recording were enclosed and referred to in the said report and I agree with the submission by counsel that it is the basis in the decision-making process and hence the applicant has the right to
D discovery as the documents are indeed relevant for the purpose of an order for discovery.

[29] I refer to the said report and I cross refer to the applicant's application encl. 15 at para a (xiv-xxviii) respectively, as follows:

E (a) At para 3.1 (p. 4 of the said report), the evidence of applicant known as (kdg B-1) was recorded on 16 July 2014;

(b) At para 3.2 (p. 5 of the said report) the evidence of subject known as Kop Fauzi bin Uda (kdg B-2) was recorded on 17 July 2014;

F (c) At para 3.3 (p. 6 of the said report) the evidence of the evidence of subject known as Kop Yusop bin Enjok (kdg B-3) was recorded on 17 July 2014;

(d) At para 3.4 (p. 7 of the said report) the evidence of the evidence of subject known as Konst (Percubaan) Rasali a/l Omar (kdg B-4) was recorded on 17 July 2014;

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(e) At para 3.5 (p. 8 of the said report) the evidence of the the complainant known as Insp G/18053 Rizuan bin Roslan (A-1) was recorded on 7 August 2014;

(f) At para 3.6 (p. 9 of the said report) the evidence of the Insp G/16049
H Arif bin Ismail known as (A-2). I find that no date was mentioned in the said report when the said evidence was recorded;

(g) At para 3.7 (p. 9 of the said report) the evidence of the ASP G/14755 Rosdi bin Ghani known as (A-3) was recorded on 22 July 2014;

I (h) At para 3.8 (p. 9 of the said report) the evidence of the ASP G/12422 Hasri bin Alias known as (A-4) was recorded on 8 August 2014;

(i) At para 3.9 (p. 10 of the said report) the evidence of the L/Kop RF 148655 Suhaimi a/l Penjajah known as (A-5). I find that no date was mentioned in the said report when the said evidence was recorded;

(j) At para 3.10 (p. 10 of the said report) the evidence of the Kop RF/109787 Bah Atai a/l Ahpik known as (A-6) was recorded on 17 July 2014;

(k) At para 3.11 (p. 10 of the said report) the evidence of the Kop RF/112648 Zainal a/l Bah Husain known as (A-7). I find that no date was mentioned in the said report when the said evidence was recorded;

(l) At para 3.12 (p. 10 of the said report) the evidence of the Kop 68997 Itam a/l Hamid known as (A-8) was recorded on 17 July 2014;

(m) At para 3.13 (p. 11 of the said report) the evidence of the Konst (Percubaan) RF/186819 Mohd Azawari bin Ghazali Buyong known as (A-9) was recorded on 21 July 2014.

(n) The document at para a (xxvii) that is the laporan perlanggaran tatatertib terhadap subjek (the applicant) was referred to by the disciplinary board as stated in the affidavit of the first respondent (encl. 11 – (exh. KKC1)).

(o) The document as stated in para a (xxviii) that is laporan untuk pertimbangan kes *prima facie* di bawah peraturan 37 was relied upon in drafting the charges against the applicant.

[30] Similarly, I find that all the above mentioned documents were enclosed and referred to in the said report as stated at para 3.22 and the conclusion as stated at para 3.23 and I therefore also agree with the submission by counsel that it is the basis in the decision making process and hence the applicant has the right to discovery as the documents are relevant.

The Applicant Pleaded Guilty To Both Charges As Stated In His Representation Dated 31 January 2015

[31] The respondents submitted that to produce the documents at this stage is irrelevant because the applicant has pleaded guilty to both charges and the documents were never requested by the applicant before he submitted the representation during the disciplinary proceedings. Counsel for the applicant submitted that whether the applicant had pleaded guilty (which is denied by the applicant) to both charges is not the criteria for discovery. I refer to affidavit of the applicant (encl. 2) at paras. 12, 13, 14, and paras 15 which alleged that his first representation was cancelled and amended by the third respondent and third respondent had further instructed the applicant to refer to the fourth respondent who then proceeded to prepare the second representation dated 31 January 2015 which was referred to by the said report above at para. 3.21 (p. 12 of the said report). I refer to the affidavit

of third respondent affirmed on 18 April 2016 (encl. 12) and the affidavit of fourth respondent affirmed on 18 April 2016 (encl. 13) which affirmed the fact that the first representation was indeed cancelled and amended by third respondent and was later prepared by the fourth respondent. I refer to the affidavit of first respondent at para 10 which acknowledged the facts as stated in paras. 12, 13 and 14 of the affidavit of the applicant dated 10 July 2015 (encl. 2). At this juncture, I agree with the submission of the applicant that clearly the representation dated 31 January 2015 was amended, edited and sieved (ditapis) by the third respondent and could subject to evidence before the court be tainted.

[32] In this regard, I disagree with the submission by the SFC who echoed the affirmation of the first respondent that the said issues regarding the representation dated 31 January 2015 is an afterthought. Based on the above observations I am of the opinion that the fact that the applicant had pleaded guilty to both charges in which the applicant had denied is not a criteria or ingredient in application for discovery of documents.

The Disciplinary Proceedings Minutes Are Protected Under OSA

[33] The document stated in para a (xxix) are the minutes of proceedings of the disciplinary board. The SFC submitted that the minutes of the disciplinary proceeding are minutes protected under the OSA and hence cannot be given to the applicant. Counsel submitted that there is no basis for the submission alluded to by the SFC when clearly there are plethora of cases where the minutes of proceedings in a disciplinary action was made available to the person/subject in the disciplinary proceedings. She referred to the case of *Ganesan a/l Singaram v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1997] 1 LNS 227; [1998] 1 MLJ 254-255 where it was held that:

> A person who is dissatisfied with the findings of the tribunal would want to vindicate himself by instituting legal proceedings in the courts. In order to do so effectively, the notes of evidence of the disciplinary tribunal would be a pre-requisite for the proper conduct of his case. In *Nibaran Chandra v. Mahendra Nath* AIR 1963 SC 1895, the Supreme Court of India said that an appeal to a higher tribunal would be an empty formalities unless the materials on which the order was placed before the appellate authority. As MP Jain said in his book entitled *Treatise on Administrative Law* Vol 1 at p 373:
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> It is thus apparent that a record of the evidence would be as necessary as a reasoned order.

[34] I refer to the Official Secrets Act 1972 (Act 88), s. 2 defines that official secret means any document specified in the Schedule and any information and material relating thereto and includes of any other official document, information and material as may be classified as "Top Secret", "Secret", "Confidential" or "Restricted", as the case may be, by the Minster,

the Menteri Besar or Chief Minister of a State or such public officer appointed under s. 2B. I refer to the affidavit of the first respondent at para. 23.2 (encl. 11) which affirmed that the minutes are confidential (sulit) and cannot be produced and nothing more. I would expect if at all it is true then the first respondent has to show whether the said minutes has been classified as confidential when the same is not so in the present case. The SFC echoed the affirmation by the first respondent without giving any authority in support and I am of the opinion that mere assertion of confidentiality without evidence in support, could not shut out relevant evidence. I agree with the submission by counsel that there are plethora of cases as stated in para 38 of her submission where the minutes of proceedings in a disciplinary proceedings were produced and served to the other applicants. I refer to the case referred by learned counsel *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146 where Mohamed Zahir FCJ said:

> (2) a mere assertion of confidentiality and that affairs of state were involved without evidence in support, could not shut out relevant evidence;
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> ...
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> (4) in the administration of justice nothing was higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that was charged with deciding according to the truth.

[35] As rightly pointed out by counsel that there are inconsistency between the evidence of A-7, A-8, and A9 with the CCTV recording where the witnesses affirmed that they didn't see any contraband activities. In this case, the applicant is dissatisfied with the findings of the disciplinary board and he definitely would want to vindicate himself by instituting legal proceedings in the courts. In order to do so effectively, the notes of evidence of the disciplinary proceedings would be a prerequisite for the proper conduct of his case. To avoid the court proceeding as mere empty formalities, hence it is apparent that a record of the evidence would be as necessary as a reasoned order. It cannot be overly stated the importance of having all pertinent and relevant information and documents to enable the court to come to a just conclusion of the matter before it. I would like to reaffirm the speech of HRH, the late Sultan Azlan Shah FCJ (as HRH then was) in the case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135:

> … Every legal power must have legal limits, otherwise there will be dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restrain; where it is wrongly exercised, it becomes the duty of the court to intervene. The courts are the only defense of the liberty of

A the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see these great powers and influence are exercised in accordance with the law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the
B law and it is essential that bureaucracy should be kept in its place …

There is in our administrative and judicial system a legitimate expectation that procedural fairness would be maintained throughout an administrative process. Procedural fairness in administrative proceedings is an essential element in administrative functioning.

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Conclusion

[36] In light of the foregoing and after closely scrutinising and examining all evidence adduced before me, I in the upshot conclude that the applicant has proven all the ingredients for an application for discovery. In the premise
D I could not find any legitimate ground to disallow this application for discovery. Accordingly the applicant's application is allowed with a variation to the number of days where the respondents are compelled to produce the said documents within forty-five (45) days (instead of seven (7) days as prayed) with no order as to cost.

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